

A

PP

v.

DANIEL LOKE

B

HIGH COURT MALAYA, IPOH
CHOONG SIEW KHIM JC
[CRIMINAL TRIALS NO: 45-10-2008, 45-11-2008,
45-12-2008, 45-13-2008 & 45-14-2008]
3 AUGUST 2010

C

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Whether death caused by accused - Five counts of murder by setting fire on house - Whether crucial elements of charges proved*

D

EVIDENCE: *Witness - Impeachment - Drastic contradictions between main witness' sworn testimony in court and sworn evidence before Advisory Board - Evidence Act 1950, s. 155(c) - Sole reliance of main witness' account by prosecution - Impact of impeachment of main witness' credit - Whether safe to accept impeached witness' evidence*

E

The accused was charged for five counts of murder under s. 302 of the Penal Code by setting fire on a house in which the five deceased were believed to be sleeping. A post mortem report revealed that the cause of their deaths was due to smoke inhalation. The prosecution's case relied solely on the testimony of

F

SP11 who was alleged to have been with the accused on the morning when the tragedy took place. In the examination-in-chief, SP11 testified that his friend, Koe Loh, had called him one day requiring his help to fetch the accused. Since SP11 did not know the accused, Koe Loh provided the latter's contact number. SP11

G

contacted the accused who asked to be fetched at 2.30am on the same night and SP11 was told to wait for his call. At about 2am the same night, the accused called SP11 and told SP11 to pick him up from a wholesale market. Upon arriving at the wholesale market, SP11 saw the accused in a red Iswara car. The accused

H

parked his car and got into SP11's car holding a 'tong' (container) and instructed SP11 to send him to Taman Soon Choon. SP11 did so as directed by the accused who showed the way. SP11 was told by the accused to stop in front of a house and the accused alighted from his car and carried the 'tong'. SP11

I

was told by the accused to drive his car further down about five

houses from the place where he stopped. While waiting, SP11 saw fire at the back of his car through the right side mirror and the accused running towards his car. After the accused got into his car, he told SP11 to send him back to the wholesale market and they arrived at the market after 3am. In the course of cross-examination of SP11, proceedings to impeach his credit was held based on drastic and material contradictions between his sworn testimony in the court and his sworn evidence before the Advisory Board. The accused was detained under the Emergency Ordinance and SP11 testified for him. Before the Advisory Board, SP11 stated that he did not meet the accused the day of the tragedy as he was asleep. SP11 confirmed that was what he told the Advisory Board but in court, his testimony changed to implicate and incriminate the accused. The defence resorted to s. 155(c) of the Evidence Act 1950 as an aid to impeach his credit. The issue that arose before the court was whether the crucial element of the charges had been proven based on SP11's testimony, whose credit had been impeached.

Held (acquitting and discharging accused):

- (1) It was not safe to accept SP11's evidence and impeaching his credit was inevitable. Having considered SP11's evidence on the whole as against his explanation regarding the material discrepancies and the omissions and absence of corroborative evidence which could possibly save his credit, there was nothing much else for the prosecution to stand on since the entire prosecution case rested on SP11 who was discredited. (paras 15 & 21)
- (2) SP11 mentioned 'Koe Loh' as the contact person between him and the accused who gave him the phone number of the accused and it was to be expected of the police to investigate further to question him with regard to his role. There was no inkling or indication by the prosecution as to Koe Loh's existence or whether he was in the list of witnesses but not called. This was a corroborative flash-point which was missed and overlooked by the prosecution. Alternatively, the non-calling of Koe Loh might well attract the invocation of presumption under s. 114(g) of the Evidence Act 1950 as there was basis for suspicion that the prosecution might be withholding evidence that could be favourable to the defence. (paras 16-17)

- A (3) One of the glaring omissions by the investigating officer was with regard to the two mobile phones seized from the accused. There was no denial that no investigation was conducted in respect of calls, if any, that were made between the accused and SP11 or between the accused and Koe Loh
- B on the night in question. There should not be any problem or obstacle for the investigating officer to retrieve information from the service providers pertaining to such calls based on the telephone numbers of the persons concerned. This aspect
- C was ventilated based on an assumption that SP11's statement to the police echoed what he testified in court. (para 18)
- (4) The efficacy of SP11's evidence could additionally be tested by ascertaining whether the accused in fact has and drove a red Iswara car. Such neutral evidence though seemingly
- D insignificant could easily be obtained to bolster SP11's evidence but this was not considered and dealt with. (para 19)
- (5) Extraneous but important evidence was not called in to avert the potential impeachment of SP11's credit whose evidence, once rejected as not credible and expunged, breaks the case
- E for the prosecution as there was no other evidence that the prosecution could rely on to prove that it was the accused who set the house on fire. The significance was further underscored by the separate fact that SP11 may be deemed
- F as an accomplice by being an accessory to the crime. In this regard, once an accomplice is found by a trial court to be an unreliable witness, his evidence must be rejected and no question of corroboration can arise. (para 20)

Case(s) referred to:

- G *Francis Antonysamy v. PP* [2005] 2 CLJ 481 FC (*refd*)
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA (*refd*)

Legislation referred to:

Evidence Act 1950, ss. 114(g), 155(c)
Penal Code, s. 302

- H For the prosecution - Azizah Hj Ahmad; DPP
For the accused - Dexter Mah (Edmond Bon with him); M/s KS Su & Mah
Reported by Najib Tamby

I

JUDGMENT

A

Choong Siew Khim JC:

[1] The accused is charged on five counts under s. 302 of the Penal Code for the murder of Chai Mooi Fong, Lim Kiam Hwa, Chai Kim, Chai Kar It and Tan Wei Limm at about 3.30am on 31 May 2007. The offence is alleged to have been committed by the accused for setting on fire to a house at No. 48, Lebuhrapat Baru 13, Taman Soon Choon, Kampung Rapat, Ipoh, Perak, in which the five deceased were said to be sleeping. They perished in the fire. The five charges are marked as P1A, P2A, P3A, P4A and P5A.

B

C

[2] My heart is totally with the families of the five deceased persons but it is my onerous duty to decide whether the prosecution has made out a *prima facie* case based solely on the evidence adduced. From the outset, it is not denied that the prosecution case lies wholly on the testimony of SP11 (Chong Chee Seong) who was alleged to have been with the accused on the morning of the fire on 31 May 2007. It is conceded by the defence in its submissions that these facts are not disputed:

D

E

(a) That there was a fire at about 3.30am at house no. 48, Lebuhrapat Baru 13, Taman Soon Choon, Kg. Rapat, Ipoh.

(b) Five occupants in the house perished as a result.

F

(c) The cause of death was due to smoke inhalation (see post-mortem reports P52 - P56 and testimony of SP12, Dr Mohammad Shafie bin Othman, the forensic pathologist).

[3] The only material fact in dispute is whether it was the accused who started the fire that caused the death of the deceased persons and to prove this, the prosecution totally relies on the evidence of SP11, the star witness. The question is whether this crucial element of the charges has been proved based on SP11's testimony.

G

H

[4] It was initially SP11's testimony (in examination-in-chief) that his friend of ten years "Koe Loh" called him one day asking for his help to fetch his friend by the name of Ah Ben (later identified as the accused). Koe Loh gave Ah Ben's phone number to him and told him to call Ah Ben. SP11 did not know Ah Ben. SP11 subsequently called Ah Ben who asked him whether he could fetch

I

A him at 2.30am the same night. He said “yes”. Ah Ben told him to wait for his call. He turned in to sleep. At about 2am the same night he received a call from Ah Ben who told him to pick him up from a wholesale market between Farlim and Menglembu. He went to fetch Ah Ben in a Honda Civic which belonged to a friend.

B
C [5] On arriving at the wholesale market, SP11 saw Ah Ben in a red Iswara car. Ah Ben had earlier told him he would be in such a car. Ah Ben parked his car and got into SP11’s car holding a “tong” (container) which looked similar to P17. Ah Ben told him to send him to Taman Soon Choon. He did so as directed by Ah Ben who showed the way.

D [6] He was told by Ah Ben to stop in front of a house. He saw Ah Ben alighting from his car and carrying the said “tong”. The accused told him to drive his car further down about five houses from the place where he stopped in front of the house.

[7] SP11 said to this effect:

E Di mana saya berhenti kereta OKT masuk ke kawasan rumah di mana saya berhentikan kereta tadi. Terdapat pagar di rumah tersebut. Saya tidak tahu bagaimana beliau masuk ke kawasan rumah tersebut.

F Dari posisi saya berhenti kereta saya nampak ada 2 buah kereta di dalam kawasan pagar rumah tersebut. Sebuah kereta Kenari dan sebuah lagi saya tidak ingat kereta jenis apa.

G [8] About one to two minutes later while he was waiting inside his car, SP11 saw fire at the back of his car through the right side mirror and the accused running towards his car. The fire was in front of the house. After the accused got into his car, he told SP11 to send him back to the wholesale market. They arrived at the market after 3am.

H [9] In the course of cross-examination of SP11, proceedings to impeach his credit was held at the behest of the defence based on drastic and material contradictions between his sworn testimony in court and his sworn evidence before the Advisory Board that heard the representations of the accused on 26 September 2007. The accused was detained under the Emergency Ordinance and SP11 testified for him. With reference
I to certified notes of proceedings before the Advisory Board

(‘D61’), SP11 said in a one-liner that he did not meet the accused on 31 May 2007 at about 2.50am. He was asleep at that time because he had to work at 7am. SP11 confirmed that was what he told the Advisory Board. (Note: Based on the evidence of SP9, the accused was arrested and remanded on 2 June 2007 in connection with this case. He was released on 15 June 2007 and on the same date detained under the Emergency Ordinance. He was only charged on 21 March 2008 going by his first appearance in court based on the minutes of the magistrate’s court in the court file).

[10] SP11 evidently and completely changed his tune to implicate and incriminate the accused on 28 April 2010 when he testified in court. That being a complete turnabout, the defence moved the court under s. 155(c) of the Evidence Act 1950 to impeach his credit. After hearing and overruling the prosecution’s objection and concern that D61 may not be an inconsistent former statement within the meaning of s. 155(c), I proceeded to explain to SP11 the material contradictions between what was stated by him in D61 and his testimony in court after which he was asked for his explanation about the contradictions.

[11] He explained that the accused had induced him to state what he told the board by promising to get a lawyer for him at his own Advisory Board hearing (note: SP11 was also detained under the Emergency Ordinance on 4 July 2007 after his arrest on 22 June 2007 in connection with this case based on the testimony of SP9). After testifying the way he did *vide* D61 on 26 September 2007 the accused did not get a lawyer for him.

[12] Against this backdrop, it is pertinent to note however that at his own hearing before the board which must be after that of the accused based on the alleged promise made by the accused, SP11 denied the third allegation of fact that together with two other allegations of fact formed the basis for his detention. The third allegation of fact was that on 31 May 2007 at about 2.50am he had sent someone to Taman Soon Choon. This was elicited from him in cross-examination just before he was shown D61 and the portion which contained his testimony before the board on 26 September 2007. His testimony at both hearings before the Advisory Board in short was consistent. His explanation later regarding his contradictory evidence that he was induced by the accused to lie hence could not be reconciled as he had on his own admission also denied the same allegation against himself at his own hearing before the board.

A [13] What SP11 told the board was after he had given a statement to the police in the course of their investigations in the instant case on 4 July 2007. The investigating officer SP9 (DSP Thiew Hock Poh) said in examination-in-chief:

B Rakaman percakapan oleh Chong Chee Seong ada pada 4.7.2007.

C [14] If that statement to the police was exactly the same with or similar to what he testified in court and this should be within the knowledge of the learned deputy public prosecutor based on the investigation papers, then it was necessary if not imperative for her to refer to this statement in an attempt to save his credit and to establish that he was really induced to lie by the accused. Nevertheless this could not explain why he said the same thing at his own Advisory Board hearing of his representations.

D [15] Ultimately I am left totally baffled as to which is the true or false version and when would SP11 choose to tell half-truths or even lie when the situation suited him. There are two divergent sets of evidence in respect of the incident which would not have happened if SP11 was a man of credibility and reliability. One version spoke of picking the accused up and sending him to a house in Taman Soon Choon. The other said he did not meet the accused on the night in question as he was fast asleep. At the end of the prosecution case, I hold that it is not safe to accept SP11's evidence and impeaching his credit is hence inevitable. I decide so also from another angle and perspective. There was an opportunity to consider that SP11's credit could remain intact and be saved despite the contradictions if there was extraneous evidence to corroborate SP11's evidence in court to render it inherently probable. "Koe Loh" (his real name not being known to SP11) was mentioned by SP11 as the contact person between him and the accused who gave him the phone number of the accused. One person by the name of Chin Fook Chuan was also detained by the police to assist in investigations but he was not called to be identified as "Koe Loh". SP9 testified (in re-examination) that SP11 and Chin Fook Chuan were detained as potential prosecution witnesses:

Kedua-dua penama yang ditahan dijadikan saksi pendakwaan kes ini.

I

[16] If Koe Loh was mentioned by SP11 in his statement to the police, it was to be expected of the police to investigate further to question him with regard to his role. As it were, there was no inkling or indication by the prosecution as to Koe Loh's existence or whether he was in the list of witnesses but not called. As so submitted by learned counsel for the defence, this was a corroborative flash-point which was missed and overlooked by the prosecution.

A

B

[17] If Koe Loh were to testify that he did call SP11 to contact the accused, SP11's credit may well be saved after consideration of other evidence besides that of SP11 at the end of the prosecution case. Alternatively, the non-calling of Koe Loh may well attract the invocation of a s. 114(g) (Evidence Act) presumption as there is basis for suspicion that the prosecution may be withholding evidence that could be favourable to the defence.

C

D

[18] One other glaring omission by the investigating officer was with regard to the two hand-phones seized from the accused by ASP Ramasamy a/l Vyapuri (see police report P48 and search list P49). There is no denial that no investigation was conducted in respect of the calls, if any, that were made between the accused and SP11 or between the accused and Koe Loh on the night in question. There should not be any problem or obstacle for the investigating officer to retrieve information from the service providers pertaining to such calls based on the telephone numbers of the persons concerned. This aspect is ventilated based on an assumption that SP11's statement to the police echoed what he testified in court.

E

F

[19] The efficacy of SP11's evidence could additionally be tested by ascertaining whether the accused in fact has and drove a red Iswara car. Such neutral evidence though seemingly insignificant could easily be obtained to bolster SP11's evidence but this was not considered and dealt with.

G

H

[20] Extraneous but important evidence of the sort stated above was not called in to avert the potential impeachment of SP11's credit whose evidence, once rejected as not credible and expunged, breaks the case for the prosecution as there is no other evidence that the prosecution can rely on to prove that it was the accused who set the house on fire. The significance is further

I

- A underscored by the separate fact that SP11 may be deemed as an accomplice by being an accessory to the crime. In this regard, once an accomplice is found by a trial court to be an unreliable witness, his evidence must be rejected and no question of corroboration can arise (see *Francis Antonysamy v. PP* [2005] 2 CLJ 481 and *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466). There is nothing left to be accomplished with the impeachment of SP11's credit.

- C [21] At the end of the prosecution case, after having considered SP11's evidence on the whole as against his explanation regarding the material discrepancies and the omissions and absence of corroborative evidence which could possibly save his credit, there is nothing much else for the prosecution to stand on since the entire prosecution case rests on SP11 who is discredited. In finding that the prosecution has failed to adduce credible evidence proving the crucial ingredient that it was the accused who set the house on fire which led to the death of the five persons, I am compelled to acquit and discharge the accused of the five charges without calling for his defence.

E

F

G

H

I